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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 377.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

BEN B. SWARTZ,
Defendant-in-Error.

In Error to the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR DEFENDANT-IN-ERROR.

STEVENSON, CARPENTER, BUTZEL & BACKUS,
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IN THE

Supreme Court of the United States,

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No. 377

UNITED STATES OF AMERICA,
Plaintiff-in-error,

vs.

BEN B. SWARTZ,
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of the Case.

This is a writ of error to review an order of the District Court sustaining a demurrer to an indictment charging an offense under the Act of October 22, 1919, c. 80 (41 Stat. 297), amending Section 4 of the Act of August 10, 1917, c. 53, (40 Stat. 276), commonly called the Lever Act.

A proper statement of the case is made in the opinion of the District Judge, which reads as follows:

> "This cause is now before the Court on demurrer and motion to quash an indictment herein. The indictment is based upon the act of Congress approved August 10, 1917, as amended October 22, 1919, the so-called Lever Act. Defendant is charged with violating the provision of section four of said act, prohibiting the making of 'any unjust or unreasonable rate or charge for handling or dealing in or with any necessaries,' in making a certain sale of potatoes at a time and place, to a person, and at a price, specified in said indictment.
>
> "Defendant demurs to and moves to quash the indictment on the grounds that it is too vague, uncertain and indefinite, to state any offense against the United States, or to inform the defendant of the nature of the offense with which he is charged, and that the statute upon which the indictment is based, and the language of which is followed in said indictment, is unconstitutional and void for the same reasons.
>
> "The sole question, therefore, involved is whether the provision of section four of the Lever Act to the effect that 'it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' is unconstitutional for the reasons thus urged. The same question was considered and decided by this Court adversely to the contentions of the Government in the case of *Detroit Creamery Company, et al.*, vs. *John E. Kinnane, et al.*, in which the bill of complaint was filed the day after the filing of the indictment herein, and in which the opinion and decree on final hearing have been this day filed. That case controls the disposition of the present one, and for the reasons stated

in the opinion granting the permanent injunction therein the present demurrer must be sustained and the motion to quash granted. An order will be entered to that effect" (Transcript, pp. 5 and 6).

ARGUMENT.

The fundamental questions relating to the constitutional validity of the statute have been so fully presented in the brief for the appellees in the case of *Harry B. Tedrow, as United States District Attorney, appellant,* v. *The A. T. Lewis & Son Dry Goods Company, et al.,* on appeal from the District Court of the United States for the District of Colorado (No. 357 of this Term), and in the brief for the plaintiffs-in-error in the case of *Weed's, Inc., and Gurdon H. Smith* v. *United States,* in error to the District Court of the United States for the Northern District of New York (No. 558 of this Term), that it is unnecessary to review the argument in this case.

We present the following points:

FIRST: The statute at the time of its enactment and attempted enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the Indictment, to regulate the prices of retail sales in wholly intrastate transactions.

Our argument in support of this point is fully stated in the brief for plaintiffs in error in *Weed's Inc., and Gurdon H. Smith* v. *United States,* No.

558, Point Second, pages 17-27, and in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points I and II, pages 19-103.

What is there said need not here be repeated, but is referred to and adopted in this case.

SECOND: The statute does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments to the Federal Constitution.

Our argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points III, IV, VI, VIII, pages 103-148, 162-172, and 181-188; and in the brief for plaintiffs-in-error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, No. 558, Point Fifth, pages 54-68.

What is there said need not be here repeated, but is referred to and adopted in this case.

THIRD: The statute in question is arbitrary class legislation in violation of the Federal Constitution.

The argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Point V, pages 148-161, and in the brief for plaintiffs-in-error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, Point Sixth, pages 68-82.

What is there said need not here be repeated, but is referred to and adopted in this case.

While the argument against the constitutionality of the statute disposes of this case, a word may be said as to the indictment.

FOURTH: The Indictment did not inform the accused "of the nature and cause of the accusation", as required by the Sixth Amendment to the Federal Constitution.

The indictment charges that the defendant "did unlawfully, wilfully, and knowingly make and exact an unjust and unreasonable rate and charge for handling and dealing in, and dealing with a certain quantity of food, to-wit, potatoes * * * by then and there making and charging for a certain quantity of food, to-wit, one 150 pound bag of potatoes the price of Fourteen Dollars ($14) per bag * * * said price of Fourteen Dollars ($14) per bag covering and containing an unjust and unreasonable rate or charge for the handling, dealing in and dealing with the said necessary, to-wit: potatoes, in violation of the aforesaid act of Congress, * * *."

It is shown in the brief for the appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, and the brief for plaintiffs-in-error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, No. 558, that the provision of Section 4 of the Lever Act, as amended, here in question, is void, being so indefinite and uncertain as not validly to define a crime. The form of the indictment in the present case is a further illustration of the indefiniteness and uncertainty of the statute.

Certainly if the Sixth Amendment is to be any protection to the accused, this indictment does not satisfy its requirements.

In answer to this contention the learned Solicitor General says (Govt. brief in *United States v. L. Cohen Grocery Company*, No. 324, pp. 41, 42):

> "If it is competent for Congress to denounce as an offense an unreasonable and unjust act and leave it to the jury to determine from the evidence whether, as a fact, the transaction complained of is unjust and unreasonable, the indictment in this case gives to the defendant all the notice which the Constitution requires or which could properly be given. The real objection in this case is that the Act of Congress is itself too vague and uncertain to admit of enforcement. We therefore pass to a consideration of that question."

We respectfully submit that by thus stating the matter the learned Solicitor General has avoided a consideration of the constitutional objection. We respectfully contend that the indictment in this case is so vague and uncertain that it fails to inform the accused "of the nature and cause of the accusation."

We call attention to the language of Mr. Chief Justice Marshall in his celebrated opinion in *United States v. Burr*, 25 Fed Cas., No. 14693, p. 176:

> "The 8th Amendment of the Constitution (obviously he meant the 6th) has been pressed with great force, * * *. The accused cannot be said 'to be informed of the nature and cause of the accusation' unless the indictment give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defense."

The indictment in the present case gave the defendant no such notice.

The order of the District Court should be affirmed.

Respectfully submitted,
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Attorneys for Defendant-in-error.

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